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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1939**

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# No. 667

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JOHN CARLSON

*Appellant,*

*vs.*

THE PEOPLE OF THE STATE OF CALIFORNIA.

---

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SHASTA.

---

## STATEMENT AS TO JURISDICTION

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RICHARD GLADSTEIN,
AUBREY GROSSMAN,
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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1939**

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# No. 667

---

JOHN CARLSON

*vs.* *Appellant,*

THE PEOPLE OF THE STATE OF CALIFORNIA.

*Appellees.*

---

## STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of this Court, the appellant herewith submits his statement showing that the appeal in the above-entitled cause is properly before this Court.

### Opinion Below

The opinion of the Superior Court of the State of California, in and for the County of Shasta, is not officially reported. It refers to and adopts a former opinion rendered in another and different case. Both the opinion in the instant case, and the earlier opinion made applicable to the instant case by the court's express language, are appended to this statement.

## Jurisdiction

### (1) Statutory Provisions Sustaining Jurisdiction

The jurisdiction of this court is invoked under Section 237 (a) of the Judicial Code, as amended by the Acts of February 13, 1925, January 31, 1928, and April 26, 1928.

### (2) State Statute Drawn Into Question and Decision in Favor of Its Validity

The appellant contended in the court below that certain portions of the anti-picketing ordinance of the County of Shasta, State of California (under which portions the appellant was charged and for a violation of which he was convicted) were repugnant to the Constitution of the United States in that, on their face and as applied to and enforced against the appellant, said portions of said ordinance deprive the appellant, in contravention of the Fourteenth Amendment of the Constitution of the United States, of liberty and property without due process of law, by denying him freedom of speech, freedom of press, freedom of locomotion, the right peaceably to assemble, the equal protection of the laws, and rights under the National Labor Relations Act, 49 U. S. Statutes 449.

The decision of the court below was in favor of the validity of the said ordinance in its entirety.

The ordinance in its entirety is appended hereto. Those portions of the ordinance under which the appellant was charged and for a violation of which he was convicted, follow:

> "Section 2. It shall be unlawful for any person, in or upon any public street, highway, sidewalk, alley or other public place in the County of Shasta, State of California, to loiter in front of or in the vicinity of, or to carry, show or display any banner, transparency, badge or sign in front of, or in the vicinity of, any works,

or factory, or any place of business or employment, for the purpose of inducing or influencing, or attempting to induce or influence * * * any person to refrain from doing or performing any service or labor in any works, factory, place of business or employment. * * *"

A municipal ordinance is a "State Statute" within the meaning of Section 237 (a) of the Judicial Code.

*Schneider* v. *Irvington*, 84 L. Ed. 115;
*Lovell* v. *City of Griffin*, 303 U. S. 444.

### (3) Finality of Judgment

The judgment forming the basis of the appeal herein is final both in form and in substance, and disposes of all the elements of the controversy in the court below. The judgment affirms the legality of the conviction of appellant, and upholds the sentence imposed on appellant of a fine of $25.00 or 12 days in jail.

### (4) Judgment of the Highest Court

The judgment of the Superior Court of the State of California, in and for the County of Shasta, is that of the highest court in which, under the laws of the State of California, such judgment could be had in the case.

This case originated as a criminal prosecution against the appellant, in the Justice's Court of Township No. 9, County of Shasta, State of California. The said ordinance under which the appellant was charged, and for a violation of which he was convicted, provides by its terms that any person violating any provision of said ordinance shall be deemed guilty of a misdemeanor.

Under the provisions of Section 1425 of the Penal Code of the State of California, jurisdiction for the prosecution of misdemeanors is lodged in the Justice's Court. Under

Section 1466 of said Penal Code, an appeal from the Justice's Court lies to the Superior Court.

The California courts have ruled that no appeal or review will lie from a decision by the Superior Court reviewing a decision of a Justice's Court.

*Berkeley* v. *Cunnyngham*, 218 Cal. 714;
*McLean* v. *Freiberger*, 215 Cal. 1;
*Johnston* v. *Wolf*, 208 Cal. 286.

**(5) Appeal Timely Taken**

The order and judgment from which this appeal is taken was entered on November 14, 1939. On November 19, 1939, the petitioner, within the time limit fixed by the rules of the Superior Court of the State of California, County of Shasta, filed his petition for rehearing. On the 4th day of December, 1939, the said Superior Court denied said petition for rehearing. On the 8th day of January, 1940, the appellant filed with said Superior Court his petition for appeal accompanied by his assignment of errors and the within "Statement as to Jurisdiction". On the 8th day of January, 1940, the Honorable Albert F. Ross, Judge of the said Superior Court, made and entered an order allowing the within appeal to the Supreme Court of the United States.

**(6) Constitutional Question Timely and Sufficiently Raised**

The claim that those portions of the Shasta County Anti-Picketing Ordinance under which the appellant was charged, and for a violation of which he was convicted, offend against constitutional liberty by denying freedom of speech, freedom of the press, freedom of locomotion, the right peaceably to assemble, and the equal protection of the laws, as well as depriving him of property without due process of law, all in violation of the Fourteenth Amendment of the Constitution of the United States, was asserted consistently and frequently in the courts below.

The claim was first made by demurrer to the complaint, a motion to dismiss the complaint, a motion to quash the complaint, and objection to the jurisdiction of the trial court, all of which were urged on the occasion of the appellant's first appearance before the trial court (Rep. Tr., p. 2, 3; Cl. Tr., p. 4-13). These pleas were filed by the appellant prior to the introduction of any evidence. Said pleas were overruled, and the appellant entered his plea of not guilty.

In the course of the trial proceedings, at the conclusion of the People's case, the appellant made another motion to dismiss, based on all of the aforementioned constitutional grounds (Rep. Tr., p, 13, 14; Cl. Tr., p. 15-16). This motion was overruled.

At the conclusion of the trial, the appellant made a further motion to dismiss, based on all of the aforementioned constitutional grounds (Rep. Tr., p. 75, 76; Cl. Tr., p. 18-20). This motion was likewise overruled.

On being found guilty, the appellant filed a motion in arrest of judgment, based upon the same constitutional grounds (Rep. Tr., p. 76; Cl. Tr., p. 21-26). This motion was overruled.

The appellant appealed from the judgment and sentence of the Justice's Court to the Superior Court, raising the same federal constitutional issues (Rep. Tr., p. 77; Cl. Tr., p. 27-31).

The court below, after expressly considering these constitutional objections, rejected them and upheld the ordinance in its entirety.

In his petition for a rehearing, filed with the Superior Court, the appellant urged that the decision and judgment of the said Superior Court of itself deprived him of liberty and property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States, by denying him freedom of speech, freedom of the press, freedom of locomotion, the right peaceably to

assemble, the equal protection of the laws, and rights under the National Labor Relations Act, 49 U.S. Statutes 449. The court denied the petition for rehearing, without opinion.

### (7) Nature of the Case

The facts in the case are not in dispute. That the appellant violated those portions of the ordinance which prohibit peaceful picketing, is not denied.

At the time of his arrest on February 24, 1939, appellant was engaged, with others, in peacefully picketing the Delta Tunnel Project (Rep. Tr., p. 5). He was carrying a banner on which were inscribed the words: "This job unfair to C.I.O." Rep. Tr., p. 29; Exhibit b4).

Appellant had been hired as a tunnel worker at the project on January 26 or 27, 1939 (Rep. Tr., p. 15). The operator of the Project, a firm known as the United Concrete and Pipe Company, had no collective bargaining agreement governing the wages, hours, or working conditions of its employees (Rep. Tr., p. 41, 42).

Within a few days after appellant went to work, an organizer of the American Federation of Labor sought to enroll him and other workers on the Project into the A. F. of L. (Rep. Tr., p. 16). At noon of February 2, all twenty-nine men employed on the project held a meeting, agreed that it was desirable to select a collective bargaining representative, and conducted an election amongst themselves (Rep. Tr., p. 17, 18). It was agreed that the entire group would be bound by the selection of the majority (Rep. Tr., p. 19). A clear majority, twenty-two men, voted for the Shasta Tunnel Workers' Union, Local 250, of the International Mine, Mill and Smelter Workers' Union, an affiliate of the C.I.O. (Rep. Tr., p. 18, 19). Nineteen or twenty of these men, including the appellant, Carlson, thereupon applied in writing to Local 260 for membership, and were accepted by the union (Rep. Tr., p. 37).

From February 2 to February 23, except for a brief interval, the Project was shut down (Rep. Tr., p. 20, 21). During this period Local 260 sought, without success, to obtain collective bargaining with the employer (Rep. Tr., p. 41), 42). On February 4, and again on February 11, Local 260 filed with the National Labor Relations Board charges under oath accusing the employer of unfair labor practices in violation of Sections 8 (1), 8 (3), and 8 (5) of that Act (Rep. Tr., p. 36, 40, 41; Defendant's Exhibit 1 and 2).

On February 23, the employer re-opened the Project with new employees (Rep. Tr., p. 21). The men who had voted for Local 260 were neither requested nor allowed to return to work (Rep. Tr., p. 21). Thus locked out, these men, including the appellant, determined to peacefully picket the Project (Rep. Tr., p. 43, 44).

Picketing began early in the morning of February 24. Less than two hours later, appellant and his co-pickets were arrested and charged with violation of the county anti-picketing ordinance (Rep. Tr., p. 5). It is this arrest which is the subject of the within appeal.

The Assistant District Attorney, who was the only witness produced by the People at the trial, described the picketing as orderly and peaceful (Rep. Tr. p. 10, 11). There was no trespass on private property (Rep. Tr. p. 10), no interference with the free passage of persons or vehicles (Rep. Tr. p. 11, 12); no violence, molestation, coercion, intimidation or threats (Rep. Tr. p. 10, 11). No disturbance of the peace occurred in connection with the picketing or as a result of the picketing (Rep. Tr. p. 11).

**The Federal Constitutional Questions Involved are Substantial and a Decision by This Court is Necessary to Resolve Conflicts in the Construction of the Constitution**

(a) The question in this case is whether a county may, consistent with the federal constitution, deny the rights of freedom of speech, freedom of the press, and freedom of

assembly under the guise of an ordinance prohibiting peaceful picketing. The appellant submits that the necessary effect of this ordinance on its face and as applied to the facts in this case is to deny fundamental civil liberties. The ordinance was upheld in the court below as a reasonable exercise of the police power. The existence of a substantial federal question in the case at bar is thus apparent and indisputable.

This court has spoken in unmistakable terms:

> "This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.
>
> "In every case, therefore, where legislative abridgement of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation."
>
> *Schneider* v. *Irvington* (Handbill cases), 84 L. Ed. Adv. Op. 115 at 120.
> *Hague* v. *CIO*, 306 U.S. 624
> *Lovell* v. *Griffin*, 303 U.S. 444
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> *Grosjean* v. *American Press Co.*, 297 U.S. 233
> *DeJonge* v. *Oregon*, 299 U.S. 353
> *Crandall* v. *Nevada*, 73 U.S. 35
> *Territory* v. *Anduha*, 48 Fed (2d) 171

Moreover, this court has already granted certiorari in another case involving the declaration of the validity of a similar ordinance by a state court. *Thornhill* v. *Alabama*, No. 514, Cert. granted, Dec. 8, 1939.

If the decision of the court below on this case should stand, it would nullify the decisions of this court protecting

civil liberties. In the *Handbill* cases, supra, this court declared invalid an ordinance of the City of Milwaukee which prohibited the distribution of leaflets by a picket standing before a meat market announcing that the market was unfair to organized labor. *Schneider* v. *Irvington*, supra. In the case of *Hague* v. *CIO*, supra, this court enjoined the enforcement of an ordinance of Jersey City which prohibited union street meetings and the carrying of placards and banners on the street by union members during labor disputes.

If an ordinance which in terms directly attempts to prohibit or abridge the right to distribute leaflets, the right to peaceful assembly, and the right to freedom of the press, is unconstitutional and invalid, then certainly an ordinance such as that involved in this case which attempts to curb the same fundamental rights under the guise of prohibiting picketing, must likewise be declared unconstitutional and invalid.

This Court has struck down attempts to abridge civil liberties through the use of tax powers, *Grossjean* v. *American Press Co.*, supra; of criminal sedition laws, *De Jonge* v. *Oregon*, supra; and of insurrection statutes, *Herndon* v. *Lowry*, supra.

The great decisions of this Court protecting civil liberties have made it clear that in modern times workers engaged in protecting their livelihood and their right to organize in a peaceful and lawful manner, necessarily must exercise these fundamental rights.

A municipal ordinance cannot evade the constitutional guarantees simply by outlawing as picketing the action of workers who distribute leaflets or who carry signs and placards or who meet together to protest conditions and to persuade others to their side. The act of peacefully picket-

ing is an exercise of the right of freedom of speech, freedom of the press, freedom of assembly, and freedom of locomotion.

*Senn* v. *Tile Layers Union*, 301 U.S. 468
*In re Lyons*, 27 Cal. App. (2d) 293
*People* v. *Harris*, 91 Pac. (2d) 989 (Colo.)
*Hague* v. *CIO*, supra.
*Schneider* v. *New Jersey*, supra.
*Reno* v. *Second Judicial District Court, Nev. Sup. Ct.* No. 3245, Nov. 21, 1939, CCH Labor Law, Par. 18,488.

The appellant has been denied all of these rights by the declaration of validity of this ordinance.

(b) The appellant has been deprived of property rights under the National Labor Relations Act. The right to collective bargaining secured to workers by the National Labor Relations Act is a property right entitled to protection by the Fourteenth Amendment from invasion by the states.

*Virginia Railway Co.* v. *System Federation*, 300 U.S. 515
*Texas, etc. Co.* v. *Brotherhood*, 33 Fed. (2d) 13 (Affirmed 281 U.S. 548)
*Civil Rights Statutes*, 8 U.S.C. Sec. 43, 17 Stat. 13.

The act of peaceful picketing by workers engaged in a labor dispute with their employer, is one of the "concerted activities" of Section 7 of the National Labor Relations Act. The free exercise of such picketing without interference from employers, is an essential of the right of collective bargaining.

*In the matter of Williams Coal Co.*, 11 NLRB 579

(c) Appellant has been denied the equal protection of the laws. The ordinance by its terms applies to "any person", whether laborer or not, who seeks, through publicity, to persuade potential patrons of a business establishment not

to deal with such establishment. But in practice, the ordinance is used only against workers, to deny them the equal enjoyment, protection and security of their personal, civil and property rights. Such an application, confined to members of the working class, is itself a violation of the Fourteenth Amendment. *Yick Wo* v. *Hopkins*, 118 U.S. 220; *Ex Parte Lerner*, 281 Mo. 24.

(d) The ordinance involved herein, on its face and as applied to the appellant, is too vague and indefinite to provide a standard of guilt which is sufficiently ascertainable to satisfy the due process clause of the Fourteenth Amendment to the Federal Constitution. *Herndon* v. *Lowry*, supra.

(e) A decision by this court is necessary to resolve conflicts in the construction of the constitution. While it appears to be clear that ordinances attempting to prohibit peaceful picketing are unconstitutional, there have been a number of decisions in the states reaching contrary results on this important constitutional question. The Alabama highest court has upheld such an ordinance. See *Thornhill* v. *Alabama*, supra. A lower court in Oregon has likewise upheld similar restrictions. *American Federation of Labor and Congress of Industrial Organization* v. *Bain*. Circuit Court, Multnomah County, Oregon, #132-244 decided July 8, 1939).

On the other hand, the Colorado and Nevada highest courts have held such ordinances unconstitutional. *People* v. *Harris*, supra; *Reno* v. *Second Judicial District Court*, *supra*.

Within the State of California, there have been a number of decision by Superior Courts, acting as courts of last resort in cases appealed from the Justice's or Police Court, construing identical or practically identical ordinances. Since the jurisdiction of a Superior Court is county-wide, and no

appeal or review to any higher California court lies from a Superior Court acting as an appellate tribunal, a decision of a Superior Court establishes the law for its county. The Superior Courts of Contra Costa and Alameda Counties have refused, on constitutional grounds, to uphold prosecutions for peaceful picketing under ordinances substantially similar to that involved in the case at bar. (*People* v. *Watson*, Contra Costa No. 2824, decided July 6, 1939; *Fels* v. *Justice's Court*, Alameda County No. 142,425, decided Jan. 21, 1937.) But the Superior Courts of Madera, Yuba and Shasta Counties have ruled to the contrary and upheld the prohibition by ordinance of peaceful picketing. (*Ex parte Patterson*, Madera County No. Cr. 1235, decided Nov. 1, 1939; *People* v. *Bell*, Yuba County No. 601 (Crim.), decided Dec. 7, 1939; *People* v. *Carlson*, Shasta County No. 10626, decided No. 14, 1939.) It therefore results that one fay be punished by fine and imprisonment in one county for doing that which constitutes the exercise of a constitutional right in another county within the same state. Consequently, unless there is a determination of the conflict by this Court, the Constitution of the United States means one thing in some states and in some California counties, and means something entirely different in other states and other California counties.

## Conclusion

WHEREFORE, it is respectfully submitted that the appellant in the above-entitled cause comes properly within the jurisdiction of this Court.

GLADSTEIN, GROSSMAN & MARGOLIS,
*Attorneys for Appellant.*

by RICHARD GLADSTEIN.

## EXHIBIT "A"

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SHASTA

No. 10626

PEOPLE v. JOHN CARLSON

*Decision*

On this appeal from the justice's court of Township No. Nine, there seems to be no point of fact or law urged or available except the constitutionality of the county picketing ordinance. In the habeas corpus proceedings in this court last February, No. 10119, this court rendered an opinion upholding this ordinance and it now adopts said opinion and makes it a part of the decision in the instant case. Since that time there have been several rulings of superior courts in this state on the subject. But one of them was against the constitutionality of such an ordinance, the decision of the superior court of Contra Costa County. I have had this ruling and it seems to be more political than legal, using the word in its proper sense, as it is based on the alleged liberalism of California legislation and tendencies. However I am still convinced that anti-picketing legislation is not unconstitutional. It is within the proper province of the legislative bodies and, as the Shasta County board of supervisors has been fit to pass this ordinance, it will be upheld by this court as long as it remains in effect.

The judgment appealed from is affirmed.

November 14th, 1939.

(Sgd.) ALBERT F. ROSS,
*Judge.*

## EXHIBIT "B"

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SHASTA

No. 10626

THE PEOPLE OF THE STATE OF CALIFORNIA,
*Plaintiff,*

*v.*

JOHN CARLSON,
*Defendant.*

*Judgment on Appeal*

After hearing on appeal as provided by law, and submission of the same to this Court;

It is hereby ordered, adjudged and decreed that the judgment of the Justice's Court of Township No. Nine, County of Shasta, State of California, be and the same is hereby affirmed and the clerk of this court is directed to transmit a certified copy of this judgment and the opinion of the court to said Justice's Court, after which said justice's court shall have full jurisdiction to proceed in this matter to carry into effect the judgment of conviction which is hereby affirmed.

Done in Open Court this 14th day of November, 1939.

(Sgd.) ALBERT F. ROSS,
*Judge of the Superior Court.*

## EXHIBIT "C"

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
IN AND FOR THE COUNTY OF SHASTA

No. 10119.

In the Matter of the Petition of Richard Gladstein, et al., for a Writ of Habeas Corpus.

The only point on this hearing is whether the Anti-Picketing Ordinance of Shasta County is unconstitutional to the extent that it prohibits the acts set forth in the complaint filed against these petitioners.

"The undisputed general rule is that all presumptions and intendments are in favor of the constitutionality of statutes; that all doubts are to be resolved in favor of and not against validity of a statute; that before an act can be declared invalid by the judiciary for the reason that it is in conflict with the constitution, such conflict must be clear, positive, abrupt and unquestionable, and that in case of fair, reasonable doubt of its constitutionality, the statute should be upheld." 5 California Jurisprudence, page 628.

There seems to be no definite holding by the Courts of California that an ordinance or statute prohibiting peaceful picketing is or would be either constitutional or unconstitutional. The question is very debatable, and, from the tendency of the courts in recent years to liberality in such matters, might be decided by the higher courts in favor of unconstitutionality.

However the courts to date have only gone so far as to recognize a right of peaceful picketing, and have carefully avoided holding that this right might not yield to a proper

exercise of the police power by the legislature, boards of supervisors or city councils.

The most recent case, In Re Lyons, 27 California Appellate Reports, Second Series, page 293, expressly states, "No statute or ordinance prohibiting or regulating picketing is here involved. What may be the right under the police powers of the state, or any of its political subdivisions, to *prohibit* or regulate the use of the public streets or sidewalks for picketing is not before us and is not decided."

The various other cases on the subject carry the same thought throughout.

Therefore in the absence of any ruling of the Appellate Courts or the Supreme Court of this state that such a statute or ordinance is unconstitutional, and there certainly being at least a logical argument that such is a proper exercise of the police power for the preservation of the public peace and safety, I hold the ordinance must be deemed to be constitutional.

The court therefore makes the following minute order:

The writ of habeas corpus is discharged, the petition is denied and the petitioners are remanded in the custody of the sheriff of Shasta County, and the clerk is directed to redeliver to the sheriff the original warrant of arrest which was filed by said sheriff with his return herein, together with a certified copy of this minute order.

February 27, 1939.

ALBERT F. ROSS,
*Judge of the Superior Court.*